

FRANK W. PERRY
Claimant

FORT SCOTT COMMUNITY COLLEGE
Respondent

**KS. ASSOC. OF SCHOOL BOARDS
WC FUND INC.**
Insurance Carrier

Upon remand the parties did not request an additional hearing but supplemented the record with the testimony of Don Meiner, the co-worker who allegedly assaulted and

battered claimant. After consideration of the additional evidence, review of the facts and application of the *Harris*¹ decision, the ALJ concluded that the respondent did not have sufficient information to anticipate an assault and battery if the two employees continued to work together. Consequently, the ALJ determined claimant's alleged injury did not arise out of his employment.

The claimant requests review and argues that he had repeatedly reported threats made against him by Mr. Meiner, his co-worker. Therefore, claimant argues respondent had reason to anticipate an assault and the claim is compensable. Accordingly, claimant requests the Board to reverse the ALJ's decision and find claimant's claim compensable.

Respondent argues the ALJ's decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant contends that on April 7, 2003, while working for respondent, a fellow employee lifted him by the throat and bent him over a railing, which injured his back and neck. Claimant testified that before the incident he had advised his immediate supervisor on two separate occasions that the fellow employee had threatened to kill claimant. Claimant further testified that on those two occasions when he reported the threats he also advised that the fellow worker was threatening him daily with physical injury.

Claimant's supervisor, Joe Ramsey, testified he did not recall either of those conversations and he further testified claimant never came to him before April 7, 2003, with complaints that claimant was having problems with Don Meiner. On the other hand, the supervisor testified he had heard claimant make a derogatory comment about his co-worker, Mr. Meiner. He further testified Mr. Meiner had complained about claimant's comments. Mr. Ramsey concluded the comments had nothing to do with work, were personal and were made jokingly or joking around with each other.

Mr. Meiner, the co-worker who allegedly assaulted and battered claimant, testified that on April 7, 2003, he asked claimant to step outside to talk about why claimant was mad at him. Mr. Meiner testified claimant got in his face and called him an evil liar whereupon Mr. Meiner used one hand to grab claimant's shirt collar. But Mr. Meiner denied that he choked claimant or grabbed his neck or that claimant fell to the ground. Mr. Meiner testified he told claimant that he was not going to put up with his crap anymore and claimant walked away. Mr. Meiner further testified claimant had complained about injuring

¹ See *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, Syl. ¶ 2, 909 P.2d 657 (1995).

his back four months before the altercation on April 7, 2003. Lastly, Mr. Meiner denied he had ever threatened claimant with any physical violence.

On appeal, the threshold question is whether, under the facts and circumstances of this case, the alleged injuries sustained by the claimant at work from an alleged assault and battery by a co-worker are compensable. Fights between co-workers usually do not arise out of employment and generally will not be compensable.² If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.³ For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,⁴ or the employer had reason to anticipate that injury would result if the co-workers continued to work together.⁵

The claimant does not contend the altercation involved a dispute over the conditions and incidents of employment or that the injuries were exacerbated by an employment hazard. Instead claimant argues the respondent had reason to anticipate injury would result if the co-workers continued to work together.

In *Harris*, the Kansas Court of Appeals held, in part:

If an employee is assaulted by a fellow worker, whether in anger or in play, an injury so sustained does not arise 'out of the employment' and the injured employee is not entitled to workers compensation benefits **unless the employer had reason to anticipate that injury would result if the two employees continued to work together.**⁶ (Emphasis added.)

The claimant alleged that Mr. Meiner threatened to kill him and he had told his supervisor about the threat on two different occasions. Mr. Meiner denies he made any such threats. Claimant's supervisor noted that he would have documented such an allegation. The ALJ concluded that an urgent communication that one of his employees was suicidal or threatening violence would not be the sort of thing that Mr. Ramsey would forget. The Board agrees and affirms the finding claimant has failed to meet his burden of proof that the respondent had reason to anticipate injury would result if the two employees continued working together.

² *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

³ See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

⁴ *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

⁵ *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

⁶ *Id.* Syl. ¶ 2.

WHEREFORE, it is the finding of the Board that the Supplemental Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 11, 2004, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of October 2004.

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director